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Supreme Court of the United States

October Term, 1957

No. 424

PIERRE BOURGEOIS,

Petitioner,

vs.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PIERRE BOURGEOIS seeks by Certiorari to review a decision and judgment of the Supreme Court of Florida in a certain cause entitled **Pierre Bourgeois**, Appellant, vs. **Mercantile National Bank of Miami Beach**, Florida a United States corporation, Appellee, **95 So. 2d. 918.**

No Jurisdiction Shown

Petitioner contends that jurisdiction to review the decision or judgment of the Supreme Court of Florida **[Bourgeois v. Mercantile National Bank, 95 So. 2d. 918]** is conferred by Section 1254, and sub-sections 2 and 3 of Section 1257, Title 28 USCA, but we respectfully submit

that neither the petition for certiorari, nor the record shows jurisdiction under the Sections claimed, nor under any other statute, rule, or law.

We submit that Section 1254, Title 28 USCA, has no application to this case, and confers no jurisdiction upon this Court to review the judgment [Bourgeois v. Mercantile National Bank 95 So. 2d. 918] of the Supreme Court of Florida, because that Section applies only to "cases in the courts of appeal" created pursuant to Sections 41-48, Title 28 USCA, and has no application to "Final Judgments or decrees rendered by the highest court of a state," in the case at bar, the Supreme Court of Florida, which is governed by Section 1257, Title 28 USCA. Therefore, we submit that Section 1254, Title 28 USCA. must be dismissed from consideration as basis for a claim of jurisdiction in the case at bar.

Apparently Petitioner contends that juridiction of this proceeding is conferred by sub-sections 2 and 3 of Section 1257 Title USCA, and that some unspecified section or sections of the National Banking Act [Title 12, Section 21 et seq. USCA] was involved in the judgment or decision (Bourgeois v. Mercantile National Bank, 95 So. 2d. 918) of the Supreme Court of Florida sought to be reviewed, but Petitioner's counsel have failed to point out or specify any "Federal question" which was ever raised "in the court of the first instance" or "in the appellate court" as required by the Rules [Rule 23(1) (f) Sup. Ct. Rules] of this Court. Indeed, we respectfully submit that no Federal question involving "the validity of a statute of any State", or " the validity of a treaty or statute of the United States", or " a State Statute" upon Constitutional grounds as required by the Statute [Sec.

1257 (2) and (3) Title 28 USCA] appears in the case at bar, either from the Petition for Certiorari, the Record, or the Brief of Petitioner's Counsel. We respectfully submit that there is no "Federal question" presented by the Petition, Record or Brief, as required by the rules [Rule 19(1) (a) Sup. Ct. Rules] of this Court.

The learned authors of Robertson & Kirkham on **Jurisdiction of the Supreme Court of the United States,** by Richard F. Wolfson and Philip B. Kurland, briefly and succinctly state the requirements for jurisdiction (page 50) as follows:

> "* * * a record from a state court which will support the jurisdiction of the Supreme Court must show:
>
> (1) That there is a final judgment or decree;
>
> (2) That the decision sought to be reviewed is by the highest court of the state in which decision could be had;
>
> (3) That the case presents a substantial federal question;
>
> (4) That the federal question sought to be reviewed was properly raised and preserved in the state courts; and,
>
> (5) That the decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment or decree.

The requirements just enumerated are the same whether review of the state court is sought by certiorari or appeal."

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, by Richard F. Wolfson and Philip B. Kurland, Sec. 22, page 50.

In **HERB v. PITCAIRN, 324 US 117, 125-126, 65 S. Ct. 459, 89 L. Ed. 789,** Mr. Justice Jackson speaking for the Court said:

"* * * Third., This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citing cases.] The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion. * * * It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on adequate and independent grounds in state law."

And,

> " 'Mere allegation of a Federal question' will not suffice; 'there must be a real, substantive question on which the case may be made to turn, that is, a real and not a merely formal Federal question is essential to the jurisdiction' of the Supreme Court. The rule is usually referred to as the requirement of a 'substantial federal question.' "
>
> Robertson and Kirkham, **Jurisdiction of the Supreme Court of the United States,** by Richard F. Wolfson and Philip B. Kurland, Sec. 58, p. 102.

We concede the presence of the first two requirements for jurisdiction, that is, a "final judgment" by the "highest court of the state," but none of the remaining three essentials are present in this case as a review of the facts will demonstrate.

The Facts

The facts shown by the record[1] are these:

Plaintiff, PIERRE BOURGEOIS, was a native of France, educated in France, and held a degree of Doctor of Civil Law. (A: 55, 79-80) The facts, as stated by plaintiff himself, were these:

On May 16, 1955 (A: 65) Bourgeois and his attorney,

---

[1]In our statement of the facts we shall employ the following symbols, which were employed in the Court below: "A" for "Appendix of Appellant," which refers to the printed Appendix filed as part of the record in this Court; "PX" for "Plaintiff's Exhibit"; "DX" for "Defendant's Exhibit" and "R" for "Record on Appeal."

Rubenstein, met Mr. Hudson, an Assistant Vice President (A: 22) of defendant Bank, at a restaurant in Miami Beach (A: 65-66). Later the same day, (A: 66) Bourgeois went to defendant Bank, and presented to Hudson this proposition: Bourgeois was expecting to receive $228,-570.00 (A: 66) from the Bank of France, for which he would give a receipt in the form of a note, (DX-4D, A: 104) In order to meet the regulations of the Bank of France, it was necessary that the Bank of France receive an "aval" from defendant Bank, which Bourgeois said (A: 66)"is not a guarantee". Following that initial conversation (A: 66) between Bourgeois and Hudson, there was an exchange of letters (PX-1A; PX-1C, A: 98-99) and cablegrams (PX-1B, A: 98; PX-1D, A: 99 and PX-1E, A: 100) which neither plaintiff (A:91) nor defendant Bank (A: 41-44) understood or considered to be an agreement by defendant Bank to guarantee any obligation of plaintiff, Bourgeois.

On May 31, 1955, by telegram (DX-D1, A: 101-102) **FIRST NATIONAL CITY BANK OF NEW YORK,** on behalf of the Bank of France, notified defendant Bank that it was depositing to the credit of defendant Bank in **CHASE MANHATTAN BANK** the sum of $228,-570.00, which said telegram (DX-D1, A: 101-102) including the instructions of the Bank of France, pursuant to which said deposit was made, read as follows according to the translation (DX-D1A, A: 102-103):

> "We have received the following cable from Banque Francaise du Commerce Exterieur Paris France for transmission to you 'WE HAVE RECEIVED YOUR CABLE READING AS FOLLOWS: MERCANTILE MAKES IRREVOC-

ABLE AGREEMENT TO REIMBURSE DRAFT DOLLARS 228,570 DESCRIBED OUR LETTERS MAY SIXTEENTH TO YOU AND CIOTAT WHICH CONSTITUTES OUR GUARANTEE IN FULL. **WE TAKE NOTICE THAT YOU GUARANTEE NONCONDITIONALLY THE REIMBURSEMENT AT DUE DATE OF A NOTE HELD BY YOU OF DOLLARS 228,570 SUBSCRIBED BY PIERRE BOURGEOIS OF NEW YORK TO THE CHANTIERS NAVALS DE LA CIOTAT STOP IN THESE CONDITIONS WE HAVE BEING TRANSFERRED BY CITIBANK NEW YORK DOLLARS 228,570 TO BE CREDITED TO THE ACCOUNT WITH YOUR BANK OF PIERRE BOURGEOIS** SIGNED EXTECOMEX' STOP **In accordance with the foregoing we will transfer on June 1 to you** through Chase Manhattan Bank of New York **$228,570.00** without responsibility on our part.

FIRST NATIONAL CITY BANK
OF N. Y."

After the receipt of the telegram (DX-D1) notifying defendant Bank that the sum of $228,570 had been deposited to its account subject to the conditions stipulated therein by the Bank of France (See: Translation—DX-D1A) Hudson testified (A: 47) that a conference was held in the office of Alvin Cassel, attorney for defendant Bank, relating to the release of the $228,570 to Bourgeois. The telegram of transmittal (DX-D1) and the translation (DX-D1A) were both before the parties at that conference, and (A: 48) were discussed.

Bourgeois and his attorney, Rubenstein, tried to convince Cassel (A: 48) that the telegram (DX-D1) did not require defendant Bank to guarantee payment of Bourgeois' note. (DX-D4, A: 104) Cassel informed Bourgeois and his attorney (A: 48-49) that if they secured written confirmation from the Bank of France that there was no obligation on the part of defendant Bank to pay Bourgeois' note (DX-D4), the funds would be released, but not otherwise. However, such confirmation was never obtained (A: 49). Subsequently, defendant Bank notified the Bank of France that the transfer having not been made upon the terms expected, defendant Bank was compelled to withdraw (A: 49-50; DX-D3, A: 103) The Bank of France requested (A: 51-52) the return of said fund ($228,570) and it was returned. Defendant Bank having refused to comply with plaintiff's demand (A: 73-75) to pay the fund ($228,570) over to him, he filed this suit seeking (A: 13-16) recovery of said fund, and from the adverse judgment (A: 105) he has appealed. (R: 575)

During the examination of Plaintiff, Bourgeois, at the trial in the Circuit Court (A: 90, 91,) the following transpired:

By Mr. Cushman:

Q. Just a moment. I am going to ask you the question again and ask you to listen to it, please. Do you claim and do you contend now in this case that the Mercantile National Bank ever made an agreement or assumed an obligation to pay the note of Pierre Bourgeois in the sum of $228,570 on December 13, 1955, if you, Pierre Bourgeois, failed to pay it for any reason whatsoever, and I will ask you first now, do you understand my question? [109] A. I understand your question.

By Mr. Cushman:

Q. Do you understand the question? **A.** Well—

Q. Yes or no; do you contend that the Mercantile National Bank obligated and bound itself to pay your note on [110] December 13, 1955 if you did not pay it; that is my question?

* * *

The Court: The witness may confer with counsel if he wishes before answering the the question.

The Witness: All right.

(Thereupon the witness conferred with counsel.)

Mr. Rassner: I think the witness has the question in mind. Would you mind answering?

The Witness: Well, I consider that an aval is not a guarantee, and the test of the cable received and repeated by the bank is supposedly evidence of what it meant.

By Mr. Cushman:

Q. You do not contend that the Mercantile National Bank ever undertook to guarantee payment of your note on December 13, 1955, if you failed to pay it? **A.** It was not necessary. I had money due to me several times that

much, and we had to do it because of the regulation in France.

Q. Your answer is no; no, you did not expect the guarantee of the payment of any note at all; is that your answer?

The Court: Yes; that is his answer.

Thus, it is clear that Petitioner, Bourgeois, did not claim or contend that MERCANTILE NATIONAL BANK of MIAMI BEACH had in fact ever promised to guarantee payment of his note (DX-D4, A: 104) at maturity, and it is equally clear from an examination of the telegram by which the funds were transmitted (DX-D1A, A: 102) that the Bank of France imposed a condition upon its transfer of funds which neither the Bank nor Bourgeois had agreed upon, that is, that the Bank guarantee payment of Bourgeois' note at maturity, and since the Bank was unwilling to make such a guarantee, it so advised the Bank of France (DX-D3, A: 103) and refused to accept the funds.

No Federal Question Involved

Upon the foregoing facts the legal principles which controlled the decision of this cause in the lower courts involved no "substantial federal question," indeed, no "federal question" at all, as a brief consideration of the facts and controlling principles will reveal.

The plain purpose of the telegram (DX-D1, as translated: DX-D1A) was to state the conditions, on which the Bank of France deposited the sum of $228,570 to the credit

of defendant Bank; in other words, the conditions on which the Bank of France made a special deposit. Under repeated decisions of the Supreme Court of Florida, the deposit by the Bank of France of the sum of $228,570 to the credit of defendant Bank subject to the conditions set forth in said telegram (DX-D1A) constituted a special deposit of that fund.

In **BRYAN v. COCONUT GROVE BANK & TRUST CO., 101 Fla. 947, 132 So. 481**, Chief Justice STRUM, speaking for the Court (Text 484-485) said:

> "Whether a deposit in a bank is general or special depends upon the contract resulting from the mutual understanding and intention of the parties with reference thereto. **The law prescribes no particular formula of contract. Like all contracts, a contract of special deposit, or deposit for a specific purpose, grows out of the mutual intention and understanding of the parties. The purpose and terms of the deposit may be fixed by express agreement, or the intention of the parties may be inferred from their declarations at the time the deposit was made, considered in connection with their conduct and all the other circumstances.** Northern Sugar Corp. v. Thompson, supra; Fogg v. Tyler, 109 Me. 109, 82 A. 1008, 39 L.R.A. (N.S.) 847, Ann. Cas. 1913E, 41; Johanna Paulina Carlson v. M.B. Kies, 75 Wash. 171, 134 P. 808, 47 L.R.A. (N.S.) 317; 3 R.C.L. 517. * * *
>
> Where the depositor, at the time the deposit is made, enters into an agreement with the bank,

or the bank receives and accepts the deposit with instructions from the depositor that the money so deposited is for a specific purpose, and for that alone, such deposit partakes of the nature of a special deposit, being sometimes called a 'specific deposit', and the relation between the depositor and bank with reference to such deposit is that of principal and agent. **Title to the deposit remains in the depositor.** Under such circumstances, therefore, the relation of debtor and creditor does not exist. Northern Sugar Corp. v. Thompson (C.C.A.) 13 F.(2d) 829; Morton v. Woolery, 48 N.D. 1132, 189 N.W. Miss. 363, 75 So. 131, L.R.A. 1918A, 61, Ann. Cas. 1918B, 388; American Bank & Presnall, 58 Kans. 69, 47 P. 556."

In **TINSLEY v. AMOS**, 102 Fla. 1, 135 So. 397, Chief Justice BUFORD said:

"Where the depositor, at the time the deposit is made, enters into an agreement with the bank, or the bank receives and accepts the deposit with instructions from the depositor that the money so deposited is for a specific purpose, and for that alone, such deposit partakes of the nature of a special deposit, being sometimes called a 'specific deposit', and the relation between the depositor and bank with reference to such deposit is that of principal and agent. **Title to the deposit remains in the depositor.** Under such circumstances, therefore, the relation of debtor and creditor does not exist. Northern Sugar Corporation v. Thompson (C.C.A.) 13 F(2d) 829;

Morton v. Woolery, 48 N.D. 1132, 189 N.W. 232, 24 A.L.R. 1107; Sawyers v. Conner, 114 Miss. 363, 75 So. 131, L.R.A. 1918A, 61 Ann. Cas. 1918B, 388; American Bank v. Presnall, 58 Kan. 69, 48 P. 556.

'If the purpose for which a special deposit was accepted by a bank cannot be accomplished, the bank is liable to the depositor for the return of the funds. American Bank v. Loretta Co. 165 Ill. 103, 46 N.E. 202, 56 Am. St. Rep. 233; Mester v. Quincy Bank, 163 Ill. App. 645; Morse on Banks & Banking (6th Ed.) ¶ 208.'"

The funds in question ($228,570.00) were deposited subject to the express understanding, and conditions stipulated by the depositor, the Bank of France, for its benefit in the telegram (DX-D1A) by which it notified defendant Bank of the deposit, that is, upon the understanding:

"* * * that you [defendant Bank] guarantee nonconditionally the reimbursement at due date of a note held by you of dollars 228,570.00 subscribed by Pierre Bourgeois of New York to the order of Chantiers Navals de la Ciotat * * *"

and, the Bank of France continued:

"In these conditions [ie, upon these conditions] we have being transferred by CitiBank New York dollars $228,570.00 to be credited to the account with your bank of Pierre Bourgeois * * *"

This was a plain stipulation that upon condition that defendant Bank unconditionally guarantee payment of Bourgeois' note in accordance with the understanding of the Bank of France to that effect, the funds were being transferred. The transmitting bank, FIRST NATIONAL CITY BANK, made it clear that said fund was being transferred upon that condition, in these words:

> **" * * * in accordance with the foregoing we will transfer on June 1 to you through Chase Manhattan Bank New York N Y $228,570.00 without responsibility on our part."**

Plaintiff's counsel has not attempted in their brief to suggest any other construction of the telegram. (DX-D1A). In **9 CJS "Banks and Banking"—678** it is stated:

> **"Special Deposits.—Where money is specially deposited to be paid on a condition imposed for the depositor's benefit, the bank has no right to pay any part of such money on the depositor's check until the condition is complied with."**
> **9 CJS "Banks and Banking"—678**

So, in the case at bar, the $228,570 was a "special" deposit, and defendant Bank had no right to pay out any of the fund until the condition stipulated by the depositor was complied with—that is, until defendant Bank agreed to unconditionally guarantee payment of Bourgeois' note at maturity in accordance with the stipulation of the Bank of France to that effect.

Neither Plaintiff Nor Defendant Acquired Title or Right to Possession of the Fund.

There can be no doubt that the telegram (DX-D1A) stipulated the conditions upon which the depositor, the Bank of France, was transferring the funds. Unless those conditions were met, unless defendant Bank agreed to unconditionally guarantee payment of Bourgeois' note at maturity in accordance with the understanding of the Bank of France to that effect, the title and right to possession of the funds remained in the depositor, the Bank of France:

> **"Title and Interest of Bank—The title to a special deposit** does not pass to the bank but **remains in the depositor.** The depositor does not part with the legal possession or the right of control and disposition."
> **5B Michie on BANKS and BANKING—p. 254-255** Citing: City Bank v. Hart, 102 Fla. 529 136 So. 446; Martin v. Meyerheim, 101 Fla. 82, 133 So. 636; Bryan v. Coconut Grove Bank, etc. Co. 101 Fla. 947, 132 So. 481, 134 So. 229.

In **BRYAN v. COCONUT GROVE BANK & TRUST CO., supra,** the Court said:

> " * * * such deposit partakes of the nature of a special deposit, being sometimes called a 'specific deposit', and the relation between the depositor and bank with reference to such deposit is that

of principal and agent. **Title to the deposit remains in the depositor."**

Defendant Bank never claimed any title or right t said fund ($228,570) because it admittedly had no lega authority to comply with the stipulated condition, and admittedly, had never undertaken nor agreed to guar antee Bourgeois' note.

The Bank Could Not Accept Nor Pay Out the Fund.

The learned trial judge in announcing his decisio (A: 96) said:

"The Court: I will grant the pending motion. I think **there is no cause of action or any claim for relief established by the evidence for the reason, if for no other reason, the bank could not, in my opinion, have safely surrendered the funds to the plaintiff without subjecting itself to liability as a guarantor.**

I do not agree that the unconditional title and right to the possession of the funds rested in the plaintiff at any time until the bank assumed the obligation which was a condition precedent to its delivery of the funds to the plaintiff, that is, the guarantee of the payment of the note which was a part of the negotiations between the bank and the plaintiff and the other parties involved.

It is not necessary for me to rule on the many

objections and motions made during the trial. If I should sustain all of the plaintiff's objections and grant all the plaintiff's motions and overrule all the defendant's objections and deny all of the defendant's motions, the result would be the same, in the light of the undisputed, uncontroverted evidence.

I do not think there is any case here at all. Nothing said changes my mind about it. I will enter judgment for the defendant."

Clearly, under the law of Florida, the title and right to possession of the fund remained in the depositor the Bank of France. It is conceded by counsel on both sides that defendant Bank could not legally become a guarantor of Bourgeois' note under the National Bank Act, and in any event it never did undertake or agree to do so. Under those circumstances, simple honesty forbade defendant Bank to pay out any of that fund to Bourgeois. Had defendant Bank done so without any intention whatever of guaranteeing Bourgeois' note, but intending instead to deny its power to make such a guaranty the Bank would have been guilty of a bald-faced fraud under the rule stated in 23 Am. Jur. "Fraud and Deceit," 885-887:

"§106. Majority Rule.—A majority of American courts hold that fraud may be predicated on promises made with a present intention not to perform them, or, as the rule is frequently expressed, on promises made without an intention of performance, and that for such fraudulent promise, relief may be had in equity or law, as

the circumstances and issues presented demand. **Recourse may therefore be had for such promises, made for the purpose of deceiving the promisee and inducing him to act, where otherwise he would not do so, in such a way as to affect his legal right or to alter his position to his injury or risk, as by making and entering into disadvantageous contracts or in some way giving over, transferring, or surrendering real or personal property or rights therein to the person who makes the fraudulent promise. The gist of the fraud in such cases is not the breach of the agreement to perform, but the fraudulent intent of the promisor, the false representation of an existing intention to perform where such intent is in fact nonexistent, and the deception of the obligee by such false promise."**

A bank exists only by virtue of public confidence in the honesty of its officers and agents. A bank which would agree to guarantee its customers' obligation notwithstanding its legal incapacity to do so would be dealing dishonestly, but even so, a bank cannot repudiate its obligation or escape liability upon such a guarantee where others have parted with their funds in reliance upon it. For instance, in **STOCKYARDS NAT. BANK v. BROWN, 81 Colo. 331, 255 Pac. 624,** the bank had contracted to guarantee its customers' notes, and when sued on its guaranty, pleaded ultra vires, but ADAMS, J., speaking for the Court (Text 624-625) rejected that defense, saying:

"The evidence of the original guaranty was sufficient; it was corroborated by the subsequent actions of the parties, showing that such was

the understanding; **but plaintiff claims that such guaranty is ultra vires under the National Banking Act** (U. S. Comp. St. Sec. 9657 et seq.) **However, even if ultra vires, the Stockyards National Bank of Denver is liable to the extent of the benefit derived.** McCormick v. Market Bank, 165 U. S. 538, 17 S. Ct. 433, 41 L. Ed. 817; McFerson v. Kepner, 76 Colo. 523, 233 P. 148, and cases there cited. To the same effect, see Citizens' National Bank v. Appleton, 216 U. S. 196, 30 S. Ct. 364, 54 L. Ed. 443."

The learned trial judge was correct when he declared [A: 96] that:

"* * * the bank could not, in my opinion, have safely surrendered the funds to the plaintiff without subjecting itself to liability as guarantor."

The Simple Point Upon Which the Case Turned

As we have shown, Plaintiff and Defendant were in agreement that Bourgeois had never requested the Bank to guarantee payment of his note at maturity, and the Bank had never agreed to do so.

Nevertheless, the Bank of France, without regard to the wishes of either Bourgeois, or the Bank, transmitted the funds by the telegram of May 31, 1955 [Page 6 supra] **subject to the condition,** inserted by the Bank of France for its benefit, **that Mercantile National Bank of Miami Beach unconditionally guarantee payment of Bourgeois note at maturity,** and "upon that condition" it trans-

mitted the funds ($228,570) to the Mercantile National Bank of Miami Beach. This "condition" inserted by the Bank of France for its sole benefit was never accepted by Mercantile National Bank of Miami Beach; it declined to accept transfer of the funds upon that condition, and accordingly, cabled the Bank of France (DX-D2, A: 103) that the "transfer having not been made as demanded and expected" it was compelled to withdraw from the transaction. The trial court held that the Bank was not compelled to accept the funds, subject to a condition to which it had never agreed, and could not lawfully agree, and thereby subject itself to possible liability as a guarantor, and that it was not liable to Bourgeois for its refusal to accept said funds and pay same over to him under those circumstances. The Supreme Court of Florida affirmed the judgment without opinion. We confidently submit that no "substantial federal question" was involved in this case, or indeed any "federal question" but on the contrary that the decision of the Supreme Court of Florida rests entirely upon non-federal grounds.

Petitioner's Brief

Petitioner argues that where one person receives funds for the benefit of another, the receiving party does not acquire title to the funds, but title belongs to the party for whose benefit the funds were received. [Petitioner's Brief, p. 9].

For the purpose of this argument, let us concede that the proposition just stated is a correct principle of law. We fail to see how that aids Petitioner in the least. In the first place, the principle as stated is not embodied in any "statute" of the United States so far as we are

aware, nor is it peculiarly a principle of "federal" law, rather than "state law." Unless the decision of the Florida Supreme Court turned upon and involved a "substantial federal question" or if the decision of the Florida Supreme Court rested upon a "non-federal" ground, as we are confident it did, then that ends this case, and the Petition for Certiorari should be denied. In the **second** place, the admitted facts, as we have related them, show that under the law of Florida, the transfer or transmittal of the funds ($228,570) subject to the condition that Mercantile National Bank of Miami Beach unconditionally guarantee payment of Bourgeois' note in that amount at maturity constituted a "special deposit", and under the law of Florida, neither Bourgeois nor Mercantile National Bank of Miami Beach acquired any title or right to possession of the fund ($228,570) unless or until said Bank accepted the condition which it had never agreed to accept, never did accept, and could not lawfully agree to accept. Mercantile National Bank never claimed nor acquired title to said funds ($228,570) and under the law of Florida, title remained vested in the special depositor [The Bank of France] until Mercantile National Bank accepted and agreed to the condition stipulated by said depositor, hence, the principle urged by Petitioner never became applicable to the case at bar.

CONCLUSION

At the threshold of this case we are met with the question of the jurisdiction of this Court to review the decision of the Supreme Court of Florida. **[Bourgeois v. Mercantile National Bank of Miami Beach** (Fla.) **95 So. 2d. 918]**. The burden rests upon Petitioner to show by the record and his Petition:

"(3) That the case presents a substantial federal question;

(4) That the federal question sought to be reviewed was properly raised and preserved in the state courts; and,

(5) That the decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment or decree."

See: Jurisdiction of the Supreme Court of the United States, by Richard F. Wolfson and Philip B. Kurland, **Sec. 22, p. 50.**

We submit that Petitioner has utterly failed to show any one of these three (3) requirements for jurisdiction, and that it is apparent that the judgment sought to be reviewed rests upon adequate non-federal grounds, and hence, his petition should be denied for want of jurisdiction.

On the other hand, we submit that the decision of the trial court, and the Supreme Court of Florida, were correct as a matter of law, and in any event, said Petition should be denied.

Respectfully Submitted,

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I do certify that a copy hereof has been furnished

To Hon. Jacob Rassner

by (~~delivery~~) (mail) this 20 day

of Sept., 1957

L. J. Cushman

By L. J. Cushman

Attorney